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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 425

NORMAN LaPORTE and ARDIS LaPORTE,
Appellants,

against

THE STATE OF NEW YORK,
Appellee.

JURISDICTIONAL STATEMENT

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BATAVIA TIMES, LAW PRINTERS,
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Opinions Below

The opinion of the Court of Claims of the State of New York is reported at 5 Misc. 2d 419, 159 N. Y. S. 2d 596 (1957). The decision of the Appellate Division, Third Department of the Supreme Court of the State of New York is reported at 5 A. D. 2d 362, 172 N. Y. S. 2d 249, (1958) modifying 5 Misc. 2d 419, 159 N. Y. S. 2d 596, (1957). The decision of the Court of Appeals of the State of New York is reported at 6 N. Y. 2d 1, 187 N. Y. S. 2d 737 (1959). Copies of those opinions are annexed hereto as appendices A, B and C respectively, at pp. 12, 19 and 26 respectively.

Grounds on Which Jurisdiction is Invoked

1. The nature of the proceeding. Appellants, property owners, brought a proceeding in the Court of Claims of the State of New York to recover an award as a result of an appropriation of claimants' real estate by the State of New York under its powers of eminent domain. Claimants' land in Albany County was appropriated by the State pursuant to Section 347(5a) of the Highway Law for thruway purposes on June 1, 1953 on the filing of the appropriation map in the County Clerk's Office. The copy of the appropriation map and the notice of appropriation required by that section, (subd. 9) and Section 10(1) of the Court of Claims Act to be personally served on the claimants, was not served until almost two years later, on April 22 and April 26, 1955. Section 19(1) of the Court of Claims Act of New York denied interest to claimants on their claim for land taken by the State from the period beginning six months after the vesting of title by said taking until the actual filing of the claim. Appellants had neither actual notice nor personal notice of the taking until approximately twenty-one of said twenty-two months after the taking. This is an appeal from the final judgment of the Court of Appeals of the State of New York affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, Third Department which reversed an order of the Court of Claims of the State of New York which had allowed claimants' interest on the award from the date of taking to the date of payment.

2. *The judgment sought to be reviewed* was dated and entered on May 25, 1959. The notice of appeal to this Court was filed in the Court of Claims of the State of New York on July 27, 1959.

3. *The statutory provision believed to confer on this Court jurisdiction* of the appeal is 28 U. S. C. Sec. 1257(2).

4. *Cases believed to sustain the jurisdiction:* Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226; Dohany v. Rogers, 281 U. S. 362; Jacobs v. United States, 290 U. S. 13; Matter of City of New York (Bronx River Parkway), 284 N. Y. 48, aff'd 313 U. S. 540; Phelps v. United States, 274 U. S. 341; Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299.

5. *State statute whose validity is involved.*

Court of Claims Act, Section 19(1). "If a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim."

Questions Presented

1. Whether Section 19(1) of the Court of Claims Act of New York on its face, and as continued and applied to deny interest to claimants on their claim for land taken by the State, (the taking being by the filing in the office of the County Clerk of a description and map of the property under condemnation), from the period beginning six months after the vesting of title by said taking until the actual filing of the claim, when the State gave no notice of the proposed or actual taking, personal or otherwise, to appellants or either of them until twenty-two months after said filing and vesting of title, when appellants had no actual knowledge of the said appropriation for approximately twenty-one of said twenty-two months, and promptly filed their claim upon obtaining said knowledge, is repugnant to the due process clause of the Fourteenth Amendment.

Statement of the Case

Claimants' land in Albany County was appropriated by the State pursuant to Section 347 (5a) of the Highway Law for thruway purposes on June 1, 1953 on the filing of the appropriation map in the County Clerk's office. The copy of the appropriation map and the notice of appropriation required by that section, (subd. 9) and Section 10 (1) of the Court of Claims Act to be personally served on the claimants, was not served until almost two years later, on April 22 and April 26, 1955. No reason appears in the record for such unwarranted delay in compliance with the statute. The claim had been verified and filed prior to service of the appropriation map and notice of appropriation, on February 15 and April 7, 1955, respectively.

The Court of Claims held (5 Misc. 2d 419) that Section 19 (1) of the Court of Claim Act was inapplicable to an eminent domain taking, and that if it were, it would be unconstitutional under Article I, Section 7 of the State Constitution and the "due process" clause of the Federal Constitution (Fourteenth Amendment), as a deprivation of that part of the claimants' just compensation represented by the interest on the award between a date six months after the filing of the appropriation map and the date of filing of the claim. (To the same effect see Zember v. State, 5 Misc. 2d 221.) The Court held that Section 19 (1) of the Court of Claims Act is not applicable to the facts herein. It further held, citing Matter of City of New York (Grand Blvd.), 212 N. Y. 538, that the deprivation of this part of claimants' property rights "without a notice to the owner which is reasonably calculated to apprise him of the action then under way and an opportunity to protect his rights to just compensation is not due

process". In ruling on the State's motion for a new trial, the Court of Claims of the State of New York indicated in its opinion at page 21 of the Court of Appeals record:

> "Accordingly, an award which does not include interest for the delay in payment, denies just compensation for the land taken, and, runs afoul of the State Constitution (Article 1, Section 7), and, because of *Court of Claims Act, Section 19, subdivision 1, if construed to withhold a part of such compensation, the due process clause of the Federal Constitution (Fourteenth Amendment) would be breached also.*" (Italics supplied.)

And again at p. 22:

> "The determination that interest should be awarded was proper. Section 19, subdivision 1, is not applicable to the facts herein. *To hold otherwise would be to run counter to natural law* and the State Constitution that just compensation must be made *and to the due process clause of the Federal Constitution, Fourteenth Amendment, section 1.*" (Italics supplied.)

The State filed a notice of appeal from the decision of the Court of Claims of the State of New York and the sole ground for appeal was that Court of Claims Act section 19, subdivision 1 was constitutional and controlled the situation herein. The Appellate Division of the Supreme Court of New York reversed the court below, after discussing federal and state precedents, holding that the statute did not violate the due process clause of the Fourteenth Amendment of the U. S. Constitution. Said the Court:

> "The court below has held, however, that section 19, subd. 1 of the Court of Claims Act is unconstitutional in that it offends the due process clause of the Federal Constitution (14th Amendment), because the description and map were not personally served upon claimants until after the six month period from the accrual of the claim had expired, and that therefore they are deprived of interest before they had actual notice of the taking. It was also found that Article 1,

section 7 of the State Constitution is violated because property is taken without 'just compensation' if uninterrupted interest is not paid.

We do not think that a statute which provides a reasonable limitation on interest may be said to be unconstitutional when full compensation for the land taken is provided for and a method of enforcing collection is provided with reasonable time limitations. The filing of the description and map in the County Clerk's Office on June 1, 1953 was constructive notice to all that the State had taken the property. A claim could have been filed immediately without regard to personal service. The claim was in fact filed before the personal service was effected." (Appendix B, pages 22-23.)

The Court of Appeals of New York, on the appeal by claimants from the decision of the Appellate Division of the Supreme Court of New York affirmed the Court below by a divided Court (4-3) with majority and minority opinions. Said the Court:

"It is argued that appellants did no know, until several weeks before they were personally served with notice of this appropriation, that 30 feet along the side of their lot had been covered by the map and description on file in the County Clerk's office, with the consequence that they are not collecting interest from six months afterward until the filing of their claim with the Clerk of the Court of Claims. Subdivision 1 of section 19 of the Court of Claims Act is attacked as unconstitutional on the basis that just compensation to owners requires the allowance of interest from the time of the appropriation, rather than from the date of the filing of their claim or from the taking of possession for Thruway purposes. The Court of Claims upheld claimants' contention, but the Appellate Division reversed and dismissed their claim to interest, stating that '*if nothing occurred to bring home knowledge of the taking to claimants, they had the full*

use and benefit of the land during the interval and could not reasonably expect both interest and possession.' (5 A. D. 2d 362, 172 N. Y. S. 2d 251.) *We agree with this view of the case.*" (187 N. Y. S. 2d 737.)

At p. 741 the Court stated:

"A claimant cannot be heard to attack the constitutionality of this statute by contending that he should be awarded interest to compensate him for a use of which he did not know that he had deprived."

Substantiality of Federal Questions

The questions raised in this case are perhaps the most vital due process questions affecting property rights since the steel seizure case. For if the procedure condoned below is not ruled unconstitutional, it means that any real property owner in the United States—be he illiterate or educated, his address known or unknown—may be deprived of his right to just compensation in eminent domain proceedings without actual or personal notice merely upon filing of a map and description in the County Clerk's office of the county where the property is located. The substantiality of the questions raised herein is reinforced by the fact that a similar case is now before the Court of Appeals of the State of New York (here cite the Morton case).

We contend that the statute, both on its face and as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment to the U. S. Constitution. This follows from this Court's opinion in *Jacobs v. United States*, 290 U. S. 13, a case directly in point, for this Court held that even though the federal statute (Judicial Code, Sec. 177) prohibited the payment of any interest in claims against the government in the absence of express contract, that nonetheless, the claimant was entitled to interest on the award, from the date of taking to the date of payment, saying (p. 16):

> "The amount recoverable was just compensation, not inadequate compensation. * * * The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking', and 'interest at a proper rate' is a good measure by which to ascertain the amount so to be added. *Seaboard Airline R. Co. v. United States*, 261 U. S. 299, 306."

The question in every case is whether the notice given was notice reasonably calculated, under all the circumstances, to apprise interested parties of the taking by eminent domain and afford them an opportunity to assert their rights.

We submit that the notice in the case at bar was given without any regard for the practicalities and peculiarities of either the individual case or the kind of cases which arise. There is no excuse in reason or logic to deprive a citizen resident of a state of some form of actual notice; we have so far been unable to discover any other statute of another state permitting the requirements of notice to be satisfied by the mere filing of a copy of the map and description in the County Clerk's office. While it may be argued that each citizen is charged with the knowledge of the law, and that therefore each and every property owner is charged with a duty of keeping apprised of the contents of papers filed in the County Clerk's office affecting his property, it must be pointed out that in *Jacobs v. United States*, *supra*, this Court held that interest had to be paid on the award because it was part of the constitutional just compensation even though the statute prohibited such payment. Here, as construed below, the statute prohibits payment of interest six months after the appropriation, if the claimant does not find out for himself that the appropriation map has been filed in the County Clerk's office,

and even though he may have been advised by counsel that the statute requires personal service of the notice of appropriation. The residence of claimants in this case was always known to the State. Appellee has no where contended that notice given by mail would have been impracticable.

Since interest in an appropriation claim is not penalty interest but rather a convenient way of admeasuring that part of constitutional just compensation caused by the delay in payment and is not dependent on a statutory provision for payment thereof, the instant statute can be held inapplicable to such claims. This was the result achieved in the *Jacobs* case, *supra*. There, this Court held that interest had to be paid on an award from the taking date to the date of payment to meet the constitutional requirement of just compensation even though Section 177 of the Judicial Code expressly prohibited payment of interest on claims against the United States unless a contract so provided.

Procedural due process of law requires, in an eminent domain taking, that no property owner's right to just compensation may be wiped out in whole or in part without a provision in the condemnation statute for service of the notice of appropriation either in person or by publication. A mere filing of an appropriation map is not constructive notice and cannot wipe out in whole or in part claimant's just compensation after any period of limitation. Where the statute, as here, requires the state to personally serve on claimant the appropriation map, then only that method comports with procedural due process of law. The administrative agency conducting the appropriation cannot disregard the legislative directive requiring personal service of process.

"When the statute prescribes a particular mode of service, that mode must be followed." *Amy v. Watertown*, 130 U. S. 301, 317.

Any other rule would surely be violative of due process. For one thing, it is too much to expect that every person who owns property will examine legal papers filed in the County Clerk's office each and every day to determine if and when the state has or might acquire title by eminent domain.

The opportunities for abuse by the procedures sanctioned below are great. As the minority in the Court below points out, the state could wait until 22 *years* instead of 22 *months* before effecting personal service of the notice of appropriation upon the claimants.

The authorities clearly spell out that just compensation *must include* "some sum in addition to the bare value of the property at the date of taking for the delay in making payment." *Matter of City of New York (Bronx Riv. Parkway)*, 284 N. Y. 48, 54, 29 N. E. 2d 465, 468, affirmed; *A. F. & G. Realty Corp. v. City of New York*, 313 U. S. 540, 61 S. Ct. 839, 85 L. Ed. 1508.

The Court below cited only one U. S. Supreme Court case. It cited *Shoemaker v. United States*, 147 U. S. 282, 321, 13 S. Ct. 361, 37 L. Ed. 170, for the proposition that "no constitutional mandate is violated by the denial of interest during periods while the owner has enjoyed the full beneficial use of his premises * * *" (6 N. Y. 2d 1, 187 N. Y. S. 2d 737 (1959)). In that case, the statute of appropriation manifested such intent as grounded the Court's *presumption* that the award took into consideration the value of continued possession or the price of delay. At bar the value of possession (if there was continued possession

during all of the time in question, as the Court assumes without foundation) was never considered because the State failed to litigate it. And there was no possibility of a presumption here. Unlike the cited case, it was the Court of Claims and not a Commission which made the award. The Court of Claims did not presume that the award took these matters into consideration because it was that Court which made the award. The Court of Claims denied a motion by the State, *after* the proceeding was terminated and the award made, to amend the decision to eliminate interest beginning six months after the filing of the map until the claim was filed by the condemnees.

The only excuse for the procedure followed by the State is in the case where the owners cannot be located. The statute here applies both to persons whose whereabouts are known and those unknown. The State has failed to provide a proper remedy through which a person who does not receive actual notice and/or personal service of notice can assert his rights to uninterrupted interest on the award.

We believe that the discussion above demonstrates that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

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APPENDIX A

La Porte v. State of New York [5 Misc. 2d 419]

NORMAN LA PORTE, *et al.*,

Claimants,

v.

STATE OF NEW YORK,

Defendant.

(Claim No. 33115.)

Court of Claims, February 13, 1957.

Eminent domain—interest on award—award to property owner must include interest from date of vesting of title in State to date of entry of such judgment for "just compensation" (N. Y. Const., art. I, § 7; U. S. Const., 14th Amdt.)—Court of Claims Act (§ 19, subd. 1) cannot constitutionally be construed to deprive property owner of interest for any part of period before he was served with notice of appropriation (Highway Law, § 347, subd. 9)—motion by State to exclude interest from date six months after vesting until date when owner filed claim (Court of Claims Act, § 19, subd. 1), denied.

1. Under the Highway Law (§ 347, subds. 5, 5-a), when the State Department of Public Works files an appropriation map in the offices of the Secretary of State and the local County Clerk, the State immediately acquires title to the property and the right to take possession—in this case, June 1, 1953. Subsequently, under said section (subd. 8), the Department of Public Works obtains a list of the names of the owners and files the list in the County Clerk's office—in this case, also, on June 1, 1953. Subsequently,

under said section (subd. 9), the owners are personally served with a copy of the map and property descriptions and a notice of appropriation—in this case, on April 26, 1955. Such an owner is entitled to "just compensation" (N. Y. Const., art. I, § 7; due process clause of U. S. Const., 14th Amdt.), which must include interest, as damages for the delay in paying him, from June 1, 1953 to the date of entry of the judgment in his favor for the amount of compensation awarded him.

2. The owner in this case filed his claim in the Court of Claims on April 7, 1955. The Court of Claims Act (§ 19, subd. 1), which provides that, if a claim is not filed until more than six months have elapsed since the claim accrued, no interest shall be allowed thereon for the period between the expiration of said six-month period and the date the claim was filed, cannot constitutionally be construed as applicable to a claim for just compensation for an appropriation. A judgment is directed in favor of claimant, with interest on the amount awarded from June 1, 1953, to the date of entry of such judgment.

3. This motion by the State, to disallow interest from December 1, 1953 (six months after vesting date) to April 7, 1955 (when owner filed claim), was made within 15 days after the Court of Claims filed its decision and before judgment was entered. Such motion is considered as a motion for a new trial, so that it may be decided on the merits (Court of Claims Act, § 9, subd. 8; Civ. Prac. Act, § 549; Rules Civ. Prac., rule 60-a). The motion is denied.

Dante M. Scaccia for claimants.

Louis J. Lefkowitz, Attorney-General (*Douglas S. Rider* of counsel), for defendant.

RUSSELL G. HUNT, J. This is an application by the State to amend the decision made herein after trial, particularly paragraph three of the conclusions of law, so as to reduce the amount of interest allowed upon the award for the appropriation of claimants' lands by the State. The ap-

propriation was for the purpose of the State Thruway system (Highway Law, art. 12-a). Interest was allowed to the claimants from June 1, 1953, the date title vested in the State, to the entry of judgment (*Chiarella v. State of New York*, 162 Misc. 232, affd. 252 App. Div. 358). The State contends, however, that interest should have been allowed for six months only from the vesting date, and, thereafter, from April 7, 1955, the date the claim was filed, until the entry of judgment (*Vescera v. State of New York*, 3 A. D. 2d 644; Court of Claims Act, § 19, subd. 1). Judgment has not yet been entered.

The motion was made within 15 days from the date the decision was filed in the office of the Clerk of the Court and is considered as a motion for a new trial so that it may be decided upon the merits (Court of Claims Act, § 9, subd. 8.; Civ. Prac. Act, § 549; Rules Civ. Prac., rule 60-a).

The combined map and description which were prepared following an actual survey of the appropriated property, with the information thereon that the claimants were the owners, was filed in the office of the Clerk of Albany County on June 1, 1953, but was not served on the claimants for almost two years later, that is, on April 22 and 26, 1955. The delay was not explained and it is not asserted that the claimants or their whereabouts were unknown—indeed, the contrary is the fact because their names appear upon the map and description of the property as the owners and they resided there.

The scheme of the statute (Highway Law, § 347) for the appropriation of property which the Superintendent

of Public Works deems necessary for the Thruway system embraces the preparation of a map and description from an actual survey and its filing in the Department of Public Works; thereafter a certified copy thereof must be filed in the Department of State, whereupon the State "may immediately enter upon and take possession of the property" (subd. 5); this is followed by the filing of a copy of the map and description in the County Clerk's office; "thereupon the appropriation • • • shall be deemed complete and the title to such property shall become and be the property of the people of the state of New York" (subd. 5-a). Following these steps, and it is to be particularly noted, after the owners have been divested of their ownership, the superintendent must deliver a copy of the map and description to the Attorney-General whose duty it is to certify to the former the names of the owners, and, upon the receipt of the certification, the superintendent must then file and record in the same County Clerk's office a notice of appropriation directed to the owners and notifying them that at some time prior to the notice the title to their property was taken from them and vested in the State (subd. 8). It is not until later that the notice, together with the map and description, are to be personally served upon the owners (subd. 9), and then, for the first time, they would be informed that at a prior time their property was taken *in invitum*.

The combined map and description that was served on the claimants herein was dated February 16, 1953; it was filed in the Department of Public Works on March 24, 1953, and in the office of the Department of State on March 25, 1953.

Appendix A.

The time of the accrual of an appropriation claim is the date of the filing of the map and description in the County Clerk's office (*Vescera v. State of New York*, 3 A. D. 2d 644, *supra*) and this is also the vesting date in the State; thus, the claimants lost their property almost two years before they were served with the notice, map and description. Their claim was filed on April 7, 1955. They have not yet been compensated.

The theory of the earlier *Chiarella* case (162 Misc. 232, 252 App. Div. 358, *supra*) was that one whose land has been taken *in invitum* should not be compelled to take less than the "just compensation" to which he is entitled under the New York Constitution (art. I, § 7). This, said Chancellor KENT, is a principle of natural law and "indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property", in the absence of which injunctive relief would be granted (*Gardner v. Village of Newburgh*, 2 Johns. Ch. 162; see, too, Desmond, Natural Law and the American Constitution, 22 Fordham L. Rev. 235, 1953). Upon the vesting of title in the condemnor, rights then became fixed (*Matter of City of Syracuse*, 224 N. Y. 201, 207), compensation is due and payable at that time (*Matter of Mayor of City of N. Y.*, 40 App. Div. 281, 285), and for any delay in payment, just compensation "must include some sum in addition to the bare value of the property at the date of taking for the delay in making payment, so that the compensation may be just. Without the addition of some sum, the requirement of just compensation constitutionally guaranteed, would not be met. (*Jacobs v. United States*, 290 U. S. 13; *Phelps v. United States*, 274 U. S. 341.)"

(*Matter of City of N. Y.* [*Bronx River Parkway*], 284 N. Y. 48, 54 affd. 313 U. S. 540). In *Imbescheid v. Old Colony R. R. Co.* (171 Mass. 209), the court said, the owner's "loss of title occurred at the date of the taking. His compensation was then due and his right to recover it with interest from that date is settled." Accordingly, an award which does not include interest for the delay in payment, denies just compensation for the land taken, and, runs afoul of the State Constitution (art. I, § 7), and, because of subdivision 1 of section 19 of the Court of Claims Act, if construed to withhold a part of such compensation, the due process clause of the Federal Constitution (14th Amdt.) would be breached also. The doctrine of the Fourteenth Amendment reached by the United States Supreme Court is "nothing but the formulation in legal phraseology of that thing which every American so ardently desires, 'a square deal', and when the courts adjudge a statute to be unconstitutional as taking property without due process of law or as denying the equal protection of the law, all that they really do is to declare in their opinion, in more or less technical phraseology, that somebody is not receiving that square deal to which he is entitled" (Abbott, Justice and the Modern Law [1913] in Warren's, The Supreme Court in United States History [1937], Vol. 2, p. 745). Whether or not subdivision 1 of section 19 is a direction for the payment of less than just compensation raises a judicial and not a legislative question (*Matter of City of New York*, 190 N. Y. 350). While "Every statute is presumed to be constitutional, and every intendment is in favor of its validity" (*Matter of N. Y. El. R. R. Co.*, 70 N. Y. 327, 342), this does not mean that the Legislature may violate what Chancellor KENT said

was "this great and sacred principle of private right", namely, just compensation for property taken *in invitum* (*Gardner v. Village of Newburgh*, 162, 168, *supra*).

When the Legislature enacted the Court of Claims Act, I ascribe to it the intention to conform to the mandate of the State Constitution and of natural law that just compensation must be made for property taken *in invitum*. Since interest is embraced within the term "just compensation", the owner is entitled to receive interest for the delay in payment of the value of his land and the courts have the authority "to determine in accordance with legal rules and principles whether or not interest should be directed to be paid" (*People ex. rel. Emigrant Ind. Sav. Bank v. Sexton*, 284 N. Y. 57, 61). The determination that interest should be awarded was proper. Subdivision 1 of section 19 is not applicable to the facts herein. To hold otherwise would be to run counter to natural law and the State Constitution that just compensation must be made and to the due process clause of the Federal Constitution (14th Amdt., § 1). With respect to the latter, the deprivation of property and rights without a notice to the owner which is reasonably calculated to apprise him of the action then under way and an opportunity for him to protect his right to just compensation, is not due process (*Matter of City of New York* [*Grand Blvd.*], 212 N. Y. 538; *People v. Adirondack Ry Co.*, 160 N. Y. 225, 239 affd. 176 U. S. 335; *Covey v. Town of Somers*, 351 U. S. 141; *Walker v. City of Hutchinson*, 352 U. S. 112). In *Matter of City of New York* (*Grand Blvd.*) (*supra*, p. 544) Judge Cardozo said, "Before the citizen's right to compensation

can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the State. He cannot be charged with the duty of hunting out the facts for himself. The State is appropriating his property by proceedings *in invitum*, and it cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adopted to bring their pendency to his attention."

The motion is denied. Submit order.

APPENDIX B

NORMAN LA PORTE *et al.*,

Respondents,

v.

STATE OF NEW YORK,

Appellant.

(Claim No. 33115.)

THIRD DEPARTMENT, MARCH 27, 1958.

Court of Claims—award—interest—under Court of Claims Act (§ 19, subd. 1), where claim is not filed until more than six months after accrual thereof, no interest may be allowed for period between expiration of six months from time of accrual to time of filing claim—motion to

amend decision of Court of Claims to allow interest in conformance with statute granted—statute does not offend due process clause of Federal Constitution—property not taken without full compensation—claimants either had actual knowledge of taking and could have filed claim to insure continuous interest, or use and enjoyment of property was not disturbed.

1. Claimants' land was appropriated for Thruway purposes, pursuant to section 347 of the Highway Law which provided that title shall pass to the State upon the filing of a description of the premises and a map thereof with the clerk of the county in which the land is situated. Under that law, title to and right to possession of the premises vested in the State on June 1, 1953. A copy of the description and a map were not served upon claimants until April 22 and April 26, 1955. The claim was verified February 15, 1955 and was filed on April 7, 1955. Claimants were awarded compensation, with interest from June 1, 1953 to the date of entry of judgment without interruption. The Court of Claims Act (§ 19, subd. 1) provides that "If a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim." A motion to amend the decision to allow interest only from June 1, 1953 to December 1, 1953 and from April 7, 1955 to the date of entry of the judgment should be granted. The statute suspends the payment of interest from a period beginning six months after the date when the claim accrued, which was June 1, 1953, and ending when the claim was filed.

2. The statute does not offend the due process clause of the Federal Constitution because the description and map were not personally served upon claimants until after the six months' period from the accrual of the claim had expired. The filing of the description and map was constructive notice to all that the State had taken the property. A claim could have been filed immediately without regard to personal service. A statute which provides a reasonable

limitation on interest is not unconstitutional where full compensation for the land taken is provided for and a method of enforcing collection is provided with reasonable time limitations.

3. Claimants either had actual knowledge of the taking and could have filed a claim to insure continuous interest, or, if they had no such knowledge, their use and enjoyment of the property was not disturbed. They are not entitled to both possession and interest on the award.

4. The property was not taken without just compensation.

La Porte v. State of New York, 5 Misc. 2d 419, reversed.

APPEAL from an order of the Court of Claims (RUSSELL G. HUNT, J.), entered February 25, 1957, denying a motion by defendant to amend a decision of the Court of Claims to limit the award of interest thereon from June 1, 1953 to December 1, 1953 and from April 7, 1955 to the date of entry of the judgment.

Louis J. Lefkowitz, Attorney-General (Dunton F. Tynan and Paxton Blair of counsel), for appellant.

Dante M. Scaccia for respondents.

COON, J. The claim was filed for damages for the appropriation of claimants' land for Thruway purposes. The land was appropriated pursuant to section 347 of the Highway Law, which provides that title shall pass to the State upon the filing of the description of the premises and a map thereof in the office of the clerk of the county in which the land is situated. That date in this case was June 1, 1953, and was the date when title to and right to possession of the premises vested in the State. (*Vescera v. State of New York*, 3 A. D. 2d 644.) A copy of the description

and map were not served upon claimants until April 22 and April 26, 1955. The claim was verified February 15, 1955, and was filed on April 7, 1955 (prior to the service of the map and description). The decision was handed down December 27, 1956, and fixed claimants' compensation at $4,000 (which is not questioned on this appeal), with interest from June 1, 1953 to the date of the entry of judgment without interruption.

The State contends that interest should only be allowed from June 1, 1953 (the date of the accrual of the claim) to December 1, 1953, and from April 7, 1955 (the date the claim was filed) to the date of the entry of judgment, pursuant to subdivision 1 of section 19 of the Court of Claims Act, which reads: "1. If a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim."

Here no one questions that the claim "accrued" on June 1, 1953. The quoted language of the statute clearly suspends interest from a period beginning six months thereafter and ending when the claim is filed. The Appellate Division in the Fourth Department has so held in several cases. (*Vescera v. State of New York*, 3 A. D. 2d 644, *supra*; *Cacciatore v. State of New York*, 4 A. D. 2d 928; *Marson v. New York State Thruway Auth.*, 4 A. D. 2d 928.)

The court below has held, however, that subdivision 1 of section 19 of the Court of Claims Act is unconstitutional in that it offends the due process clause of the Federal Constitution (14th Amdt.), because the description and map were not personally served upon claimants until after the

six-month period from the accrual of the claim had expired, and that therefore they are deprived of interest before they had actual notice of the taking. It was also found that section 7 of article I of the State Constitution is violated because property is taken without "just compensation" if uninterrupted interest is not paid.

We do not think that a statute which provides a reasonable limitation on interest may be said to be unconstitutional when full compensation for the land taken is provided for and a method of enforcing collection is provided with reasonable time limitations. The filing of the description and map in the County Clerk's office on June 1, 1953 was constructive notice to all that the State had taken the property. A claim could have been filed immediately without regard to personal service. The claim was in fact filed before the personal service was effected.

While it would seem that the record before us could have been more fully developed concerning what actually took place during the delay, only two inferences are possible. First, the State was negotiating with claimants concerning the compensation to be paid or had actually taken physical possession, in which event the claimants had actual knowledge of the taking and were charged with knowledge of the law requiring a filing of a complete description and map and the opportunity to file a claim; or, second, if nothing occurred to bring home knowledge of the taking to claimants, they had the full use and benefit of the land during the interval and could not reasonably expect both interest and possession. The opinion of the court below recites, "they resided there." It would seem clear that they either had actual knowledge of the taking and could have filed a

claim to insure continuous interest, or, if they had no such knowledge, their use and enjoyment of the property was not disturbed. They are not entitled to both possession and interest on the award, and if their possession and use was disturbed, they had ample opportunity for six months to file a claim and thus continue interest on the award until they were paid. It was the delinquency of claimants and not of the State which deprived them of a period of interest.

The language quoted by the court below from *Matter of City of New York (Grand Blvd.)*, (212 N. Y. 538), sounds appropriate, but that case did not involve interest—the statute there involved deprived the property owner of *any* compensation by the mere lapse of time without personal service. Judge CARDOZO noted that: "It [the statute] does not confine itself to a provision that the filing of the map shall *ipso facto* work an appropriation of their interest in the land. That in itself would not, we may assume, be invalid *if an adequate remedy insuring compensation were provided.*" (Emphasis supplied.) In the case at bar such a remedy is provided, and section 10 of the Court of Claims Act expressly provides that where title is vested upon the filing of a map, a claim may be made "within two years after personal service of a copy of such description and map and a notice of the filing thereof". Thus the claimants are assured of "just compensation" and are given two years after personal notice to file a claim therefor.

Compensation need not be paid concurrently with the taking, so long as some reasonable provision is made for "just compensation" and a reasonable time limit within which to claim it. (*Sweet v. Rechel*, 159 U. S. 380; see, also,

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Moller v. New York Cent. R. R. Co., 282 N. Y. 188; *Matter of Mayor, etc., of City of N. Y.*, 99 N. Y. 569; *People v. Adirondack Ry. Co.*, 160 N. Y. 225, affd. 176 U. S. 335.)

The obvious purpose of subdivision 1 of section 19 of the Court of Claims Act is to insure some degree of promptness in filing a claim and having the amount of "just compensation" adjudicated when the parties are unable to agree on the amount. Interest is allowed for six months after title vests and constructive notice is given by the filing—then interest continues, if a claim is filed, until payment. It is, in effect, only a time limitation, and does not deprive the property owner of "just compensation" and, in our view, is not unreasonable and does no violence to any constitutional rights of claimants. We find nothing in any of the cases called to our attention which holds to the contrary.

The order should be reversed and the motion to amend the decision granted, without costs, and the judgment modified accordingly, and as so modified, affirmed, without costs.

Foster, P. J., Bergan and Gibson, JJ., concur.

Order reversed, on the law, and the motion to amend the decision granted, without costs.

Judgment modified accordingly, and as so modified, affirmed, without costs.

APPENDIX C

COURT OF APPEALS
OF THE
STATE OF NEW YORK

NORMAN LA PORTE, *et al.*,

Appellants.

v.

STATE OF NEW YORK,

Respondent.

(Claim No. 33115.)

Argued January 16, 1959; decided May 14, 1959.

Eminent domain—suspension of interest—Court of Claims Act (§ 19, subd. 1) provides that no interest shall be allowed between six months from time of accrual of claim and time of filing of claim—claimants allegedly not aware that appropriation map and description by which property had been appropriated had been filed—statute suspending payment of interest during period when owner enjoyed full beneficial use of premises not unconstitutional.

The Court of Claims Act (§ 19, subd. 1) provides that "If a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim." Claimants herein were allegedly not aware that the appropriation map and description by which their property had been appropriated had been filed (Highway Law, § 347). If this was so, they were not disturbed in the use

of this property. No constitutional mandate is violated by denial of interest during periods when the owner has enjoyed the full beneficial use of his premises.

La Porte v. State of New York, 5 A. D. 2d 362, affirmed.

APPEAL from so much of the judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 8, 1958, as (1) modified, on the law, that part of a judgment of the Court of Claims (RUSSELL G. HUNT, J.) which awarded interest in the sum of $620 to claimants, (2) reversed, on the law, an order of the Court of Claims (RUSSELL G. HUNT, J.; opinion 5 Misc. 2d 419) which denied a motion by defendant for an order amending the decision with respect to the computation of interest, and (3) granted the motion and directed amendment of said decision accordingly.

VAN VOORHIS, J. Under section 347 of the Highway Law, added in its original form by chapter 914 of the Laws of 1942, title to property necessary for State Thruways and bridges is acquired by the filing in the office of the Secretary of State by the Superintendent of Public Works of a description and map of the property under condemnation and by filing a copy thereof in the County Clerk's office in each county where the property is located. A copy of the description and map is delivered to the Attorney-General, "whereupon it shall be the duty of the attorney-general to advise and certify to the superintendent of public works the names of the owners of the property, easements, interests or rights described in the said description and map, including the owners of any right, title or interest therein. Upon such certification, the superintendent of public works

shall cause a notice of appropriation to be filed and recorded in the office of the county clerk or register of the county in which such property is situated." Service upon the property owners is required to be personal, if the person to be served can be found within the State, or if service is not dispensed with for good cause. In the case of a public improvement such as the New York State Thruway, it was manifestly impossible to ascertain and serve immediately and at one time the owners of all interests in all of the parcels of property acquired. The effect of this statute is to require such notice to be served as soon as is reasonably possible. Although the provisions of this section of the Highway Law regarding notice to property owners are not claimed to render the statute invalid, they are noted in view of the comment in the dissenting opinion that unless the judgment appealed from is reversed there is no duty on the part of the State to serve property owners at any time.

Claimants-appellants in the instant case own a house and lot in the County of Albany. The frontage is 100 feet on St. Michael's Lane, and the lot is 110 feet in depth. The house is not taken. Thirty feet has been appropriated for the New York State Thruway along one side of the lot. After appropriation, the house is 5 feet instead of 35 feet from the side line. No question is before the court concerning appellants' right to be paid the value of the land appropriated, together with consequential damage to the house and the remaining portion of the lot. This appeal concerns only the question of interest upon the award. The appropriation map and description were filed in the Albany County Clerk's office on June 1, 1953, and were served personally on appellants during the latter part of

April, 1955. Their claim was filed with the Court of Claims on April 7, 1955. Interest was conceded to appellants for six months following the vesting of title in the State on June 1, 1953 (the date of filing of the description and map in the Albany County Clerk's office), but interest was suspended at the end of this six months' period, and no further interest has been conceded until the filing of the claim on April 7, 1955. From then on there is no dispute that interest is to be paid. The reasons for disallowing interest during this interim is the language of subdivision 1 of section 19 of the Court of Claims Act directing: "If a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim."

It is argued that appellants did not know, until several weeks before they were personally served with notice of this appropriation, that 30 feet along the side of their lot had been covered by the map and description on file in the County Clerk's office, with the consequence that they are not collecting interest from six months afterward until the filing of their claim with the Clerk of the Court of Claims. Subdivision 1 of section 19 of the Court of Claims Act is attacked as unconstitutional on the basis that just compensation to owners requires the allowance of interest from the time of the appropriation, rather than from the date of the filing of their claim or from the taking of possession for Thruway purposes. The Court of Claims upheld claimants' contention, but the Appellate Division reversed and dismissed their claim to interest, stating that "if nothing occurred to bring home knowledge of the taking to claim-

ants, they had the full use and benefit of the land during the interval and could not reasonably expect both interest and possession." We agree with this view of the case.

Where title has passed to the State or other public body, and the value of the property is later to be determined as of that date, interest until the adjudication of the ward is held to be payable as part of just compensation to the owner for the appropriation of his property (*Matter of City of New York [E. 178th St.]*, 107 App. Div. 22, 25, affd. on opinion of G. L. INGRAHAM, J., 183 N. Y. 571; *Matter of Minzesheimer v. Prendergast*, 144 App. Div. 576, affd. 204 N. Y. 272; *Matter of City of New York [W. 151st St.]*, 222 N. Y. 370; *Matter of City of New York [Westchester Ave.]*, 217 App. Div. 381; *Jacobs v. United States*, 290 U. S. 13). Upon the other hand, a condemnee is not allowed interest during periods while he has had an equivalent use of the property (*Matter of Mayor of City of New York*, 40 App. Div. 281, followed in *Matter of Riverside Park*, 59 App. Div. 603, 605, affd. 167 N. Y. 627). In *Matter of City of New York (Newton Ave.)* (219 N. Y. 399, 407-408) it was said, per CARDOZO, J., "We are told that great hardship will result to the city if it is charged with interest since the appropriation in 1895. But we do not now decide that it *is* chargeable with interest. That question has not been certified to us. The Albany Post road, although nominally closed in 1895, was not physically closed until 1914. Up to that time the adjoining owners had the same use of it that they had in former years. It will be for the courts below to determine, when the commissioners make their report, whether the value of the beneficial use may be set off against interest on the award [citing cases]." (Italics from original.)

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It is clear that no constitutional mandate is violated by the denial of interest during periods while the owner has enjoyed the full beneficial use of his premises (*Hamersley v. Mayor of City of N. Y.*, 56 N. Y. 533; *Donnelly v. City of Brooklyn*, 121 N. Y. 9, 21; *Shoemaker v. United States*, 147 U. S. 282, 321).

Under these decisions interest in condemnation cases until the award is a substitute for the use of real property, and, although the burden is ordinarily upon the condemnor to prove by way of offset that the value of the use has been at least equal to the interest, that does not render unconstitutional subdivision 1 of section 19 of the Court of Claims Act. Under this statute, interest accrues automatically during six months after the appropriation, and the running of interest is never suspended if the property owner files his claim before the expiration of six months. Moreover, even if he omits to file within six months, he may do so afterward which sets the interest running again. It is not too much to presume, in order to sustain the constitutionality of this section, that the property owner would file a claim if he were at any time curtailed in the dominion which he has had occasion to exercise over his property. It is said that he may not have had actual notice of the appropriation inasmuch as he is not obliged to keep himself informed of the papers in the office of the County Clerk. That may be true, but if these claimants had desired to sell or to rent and had been prevented from doing so, or had been dispossessed, it would have been brought to their attention that the power of eminent domain was being exercised, with the right on their part to file a claim. The very circumstance that it is argued that these claimants were

not aware that the appropriation map and description had been filed indicates that they were not disturbed in their use of this property. A claimant cannot be heard to attack the constitutionality of this statute by contending that he should be awarded interest to compensate him for a use of which he did not know that he had been deprived.

The possibility mentioned in the dissenting opinion herein that a property owner might make improvements to his land after the filing of the appropriation map and description has nothing to do with the payment of interest. That possibility exists regardless of whether the judgment appealed from herein be reversed or affirmed. The Thruway statute is not being attacked on any ground that it provides insufficient notice to landholders. Section 347 of the Highway Law is not challenged by the parties. Only subdivision 1 of section 19 of the Court of Claims Act is alleged to be unconstitutional.

Nothing to the contrary was held in *Matter of City of New York (Grand Blvd.)* (212 N. Y. 538); in *Matter of City of New York (Bronx Riv. Parkway)* (284 N. Y. 48, aff'd. 313 U. S. 540), or in *Jacobs v. United States* (290 U. S. 13), in none of which was the controversy now before the court presented.

The judgment appealed from should be affirmed, without costs.

Chief Judge Conway (dissenting). Subdivision 1 of section 19 of the Court of Claims Act provides: "If a claim which bears interest, is not filed until more than six months after the accrual of said claim, no interest shall be allowed between the expiration of six months from the time of such accrual and the time of the filing of such claim."

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Old section 24, the precursor of the above-quoted section, was substantially the same. The application of the provision to other than eminent domain cases is clear and fair; they generally involve a time of "accrual", that is accrual by every standard, and facts which clearly bring home to the party concerned the fact that he has a claim of some kind—or that he may have, and should inquire after it. And until recently, eminent domain cases did not present any problem, because in them, too, procedures were such that the party concerned was fully apprised of everything that was taking place. But the Legislature amended eminent domain statutes, and enacted others, wherein a very significant change was effected. Instead of the title to the property passing to the State upon personal service of a notice on the condemnee, as had previously been the case, title was decreed to pass upon the State's mere filing of a map and description in the office of the County Clerk of the county wherein the condemned property was situate. The Legislature very apparently appreciated the implications of the change it had wrought, for it amended subdivision 1 of section 10 of the Court of Claims Act to assure that a condemnee would be in no way prejudiced in the assertion of his claim by any misunderstanding or misconstruction of the word "accrual", as used in that section, dealing with the Statute of Limitations in eminent domain cases. As originally enacted, subdivision 1 of section 10 of the Court of Claims Act provided: "A claim for the appropriation by the state of lands, or any right, title or interest in or to lands shall be filed within two years after the accrual of such claim."

Traditionally, statutes providing for the taking of private property enacted that title would pass not upon the mere

filing of the map and description, as the statute at bar (Highway Law, § 347) provides, but only upon personal service on the condemnee of notice of the taking. Under those statutes, no problem arose. Since title did not pass until personal service on the condemnee, the claim did not accrue until then. Thus the two-year Statute of Limitations upon the claim (§ 10, subd. 1) did not begin to run until then, *and neither did* the six months (after which interest would stop) begin to run until then (§ 19, subd. 1). In recognition of the recent changes in appropriation statutes, providing for the passing of title upon filing of a map and description in the office of the County Clerk, and in obvious recognition of our decision in *Matter of City of New York (Grand Blvd.)* (212 N. Y. 538), which held that in eminent domain cases the filing of the map may *not be constitutionally construed as notice to the condemnee*, the Legislature in 1948 (L. 1948, ch. 688) amended subdivision 1 of section 10 of the Court of Claims Act to add immediately after the word "claim" above: "or where title is vested by the filing of a description and map in the office of the county clerk or register, then within two years after personal service of a copy of such description and map and notice of filing thereof. * * *"

Now the word "accrual", as applied to cases in which the filing constituted the taking, meant personal notice to the condemnee, i.e., the cause of action, for Statute of Limitations purposes, would not accrue until such personal notice. For other purposes it could be construed as having accrued at the filing, e.g., we may assume that the condemnee, if informed of all of the facts, would not have to wait until personal notice before filing his claim (as the condemnees

at bar did not wait). But for Statute of Limitations purposes at least, there is no accrual until personal notice. Now no change was made in subdivision 1 of section 19 (quoted *supra*, p. 8), which deals with interest on a claim against the State. No change was necessary, although a corresponding amendment would have obviated the instant difficulty. If by the amendment of subdivision 1 of section 10 "accrual" was in effect postponed, as to commencing the running of the Statute of Limitations, until personal notice served on the condemnee, why should "accrual" as mentioned in subdivision 1 of section 19 be construed as referring to the filing of the map alone? Such a construction completely ignores our decision in *Matter of City of New York (Bronx Riv. Parkway)* (284 N. Y. 48, 54, affd. 313 U. S. 540). In that case it was determined beyond all possible doubt that just compensation under our State Constitution (art. I, § 7) and under the due process clause of the Fourteenth Amendment to the Federal Constitution *must include* "some sum in addition to the bare value of the property at the date of taking for the delay in making payment". It seems clear, especially in view of that holding, that the legislative intent in amending subdivision 1 of section 10 was to postpone until personal notice the running of the Statute of Limitations on the claim *including* such Statute of Limitations as aims at the stopping of interest on the claim, since interest (absent other consideration, and there is none here) is a constitutional part thereof. That should be sufficient, in eminent domain cases, to enable us to construe "accrual" of subdivision 1 of section 19 as referring to the "personal service" of subdivision 1 of section 10. There is nothing in the relevant statutes to indicate that the Legislature purposed to substitute some other

consideration to compensate the condemnee for the delay in paying him the price of his land. Interest is the only consideration provided for, and interest accompanies the claim from beginning to end—*unless*, of course, some procedure satisfactory to the Constitution is provided to keep the interest down. No constitutional procedure for so doing has been provided here, and a contrary holding therefore would amount to an unconstitutional reduction in the just compensation to which the condemnee is unquestionably entitled under our *Bronx River Parkway* decision. To decide otherwise would be to hold that we must construe subdivision 1 of section 19 without reference to changes in the law with which it must be brought into harmony; that we must continue to apply it to its letter, in utter disregard of both legislative action affecting it and constitutional requirements controlling it. Subdivision 1 of section 19 is a statute that aims at general application to claims against the State; it does not treat exclusively or specifically of condemnation claims. Yet the latter are unique, today, because of the peculiar factual possibility now presented in such cases: that the claim may "accrue" when the claimant knows nothing about it and when nothing has occurred to charge him with knowledge of it. In such circumstances, we should not continue to construe subdivision 1 of section 19 as if no change had occurred in the law, because a change there has been—and one which brings new and substantial implications to the application of the section. And constitutionally, we *cannot* so construe it: under both Federal and State Constitutions the claim and interest on it are but a *single* entity, the two *together* being just compensation. If mere filing of the map cannot be taken as notice sufficient to begin the running of a time

limitation on the claim, then it cannot be taken as notice sufficient to begin the running of a time limitation that reduces interest on the claim. That must be our holding, in our judgment, unless we are prepared to overrule our *Bronx River Parkway* decision, holding interest as constitutionally integrated in the claim, or our *Grand Boulevard* decision, holding the filing of the map insufficient to apprise the condemnee of the taking.

Here the claim was filed *before* personal notice was served on the condemnees, so we know that they had found out about the taking some time prior to personal service. But we do not know exactly when. The record is barren of any data thereon, and the State did not even undertake to litigate the question. Yet if we are to uphold the *Grand Boulevard* case, we would have to know precisely *when* notice was brought home to the condemnees, since at the very minimum that much proof would be required to tell us when the six-month period began to run on the interest. We do not wish to be on record as saying that such six months would begin to run at such time, since we are of opinion that the Legislature intended here that the running of the six months be postponed, along with the two years on the claim, until personal notice to the condemnee. So profuse is the appropriation statute, under which this property was taken (Highway Law, § 347), with regard to notifying the condemnee of the taking, that we find no necessity for going beyond legislative words in order to reverse. Under no manner of interpretation could the State's delay in making personal service on the condemnees at bar be justified. The State notified the claimants personally approximately *22 months* after the map was filed and title had passed.

By the widest stretch imaginable, the appropriating statute could not condone that outrageous delay. We have searched the record and the briefs for some *explanation*, however slight, for that delay; not a word of excuse is offered. For 22 months the State owned the claimants' property before bestowing upon them the courtesy of telling them as much. The appropriating statute contemplates expeditious service of notice on the condemnee. We wonder what manner of interpretation could find a lapse of 22 months to be a reasonable requirement in the effectuation of service. The condemnees' *house* was not taken—the strip taken began at a line 5 feet northeast of the house. The claimants were in continued occupation of the *house* at all times, as found by the Court of Claims. Personal service could have been effected without any difficulty whatever, and the statute of appropriation provides for personal service. An interpretation would seem difficult which could find in that statute an approval of a 22-month delay in service and at the same time a punishment meted out to the condemnee for the delay brought about by the State. We would have to hold that the State's taking of possession *after* title has passed constitutes notice of the taking to the condemnee—and that it is all the notice that the condemnee requires to affect a most substantial aspect of his claim: the interest on it. What constitutes such taking of possession by the State would be a question of fact for the trial court—but here, to repeat, the State never sought to litigate it. It is of small moment that the two years after which suit is barred does not begin until some time later. What consolation is it to the condemnee that he may bring suit during a long stretch of time, when the interest on *his money* has been suspended because of the ignorance in which he has

been kept by the laxity of the State's agents. And how may we decide that the taking of possession by the State constitutes notice to the condemnee when the Legislature itself has never so enacted but, on the contrary, *expressly provided for personal notice to be served on the condemnee?* At bar the provision for personal notice is set forth in the very same statute that authorizes the appropriation (Highway Law, § 347). Certainly if the State has appropriated the property, it is going to take possession of it. And when it takes possession of it, the condemnee will have notice of the taking. Why were the provisions for personal notice to the condemnee enacted in the appropriating statute if the taking of possession be all that is necessary? Under such interpretation, personal service becomes a discretionary choice for the State's agent. Only the running of the two-year Statute of Limitations is held up by it. What does the State lose if personal service is *never* effected? The claim against the State would become absolutely static six months after the map was filed. Why should the State make personal service at all, in that case? If the claim against the State remains alive forever, the State loses nothing because of the delay. Until the claim is filed, it contains but six months' interest and nothing more. Under such ruling, the most conscientious of State agents lose all incentive to make personal service on the condemnee expeditiously. The delay brings no loss to their principal.

Even if it *were* the law that the taking of possession *does* constitute notice to the condemnee of the fact of the taking, there is not one scrap of evidence in the record at bar which could even ground an *inference* of *when* the State took possession.

May we say that, if the State did not take possession, so that the condemnee knew nothing of the taking, what he does not know does not hurt him? That is untrue (see numbered paragraph 8, *infra*). And such argument assumes both of the following:

(1) that continued possession of the property taken is the automatic equivalent of interest on the claim and

(2) the condemnee is not entitled to both possession and interest.

Number (1) above is a proposition that has never been enunciated by this court. The cases which have denied a claimant interest show that there was no automatic equation of the value of possession with the amount of interest on the claim. The value of possession or the price of delay in payment was "considered and allowed for" (*Matter of Mayor of City of N. Y.*, 40 App. Div. 281, 287), or the delay was "taken into consideration" in the making of the award (*Matter of Department of Public Parks*, 53 Hun 280), or the statutes of appropriation manifested such intent as grounded the court's *presumption* that the award took into consideration the value of continued possession or the price of delay (*Hamersley v. Mayor of City of N. Y.*, 56 N. Y. 533; *Shoemaker v. United States*, 147 U. S. 282). At bar the value of possession (*if* there was continued possession during all of the time in question, as the court assumes without foundation) was never continued because the State failed to litigate it. And there is no possibility of a presumption here. Unlike the cited cases, it was the Court of Claims and not a commission which made the award. The Court of Claims did not presume that the award took these matters into consideration because it was

that court which made the award. And the Court of Claims *could not* have made such a presumption, because the instant statute of appropriation (Highway Law, § 347), unlike the unusual statutes that grounded the presumption in the cited cases, contemplates nothing but the immediate passing of title to the State upon filing of the map, and the immediate right of the State to take possession of the property. And the Court of Claims denied a motion by the State, *after* the proceeding was terminated and the award made, to amend the decision to eliminate interest beginning six months after the filing of the map until the claim was filed by the condemnees. That disposition was fully in line with precedent. Possession is not the automatic equivalent of interest. (See *Matter of Westchester County Park Comm.*, 244 App. Div. 725.) But in our case the Appellate Division has reversed the Court of Claims.

Number (2) above, to the effect that the condemnee is not entitled to both possession and interest, is predicated on previous cases involving a most outstanding factual difference. In those cases the condemnee in possession was still the *owner of the property;* title had not passed; the taking was effected under the old statutes of appropriation, which passed title upon personal service of notice and not upon mere filing of the map. And possession of the land by the condemnee in those cases, we should add, was always present as a *fact*; at bar the claimants' continued possession of the appropriated parcel has not been proved, and it would of course be the burden of the State to produce evidence of it. Here what the court overlooked is the fact that title had passed to the State—that the condemnee is nothing more than a tenant. The court's deci-

sion is that he is a tenant *paying rent on the State's enforced terms.* That is the only result of holding possession (again, assuming there was possession) to be the absolute equivalent of interest. It is noteworthy that the only foundation for the assumption that the claimants continued in possession of the appropriated strip of land is a finding made by the Court of Claims, which we have previously adverted to, which had *nothing to do with the appropriated strip.* The court seizes upon the Court of Claims' finding that claimant "resided there." That court made such finding only with reference to the *house*, which we may assume the claimants occupy to this day. It was uttered in the context that sought to show how easy it was for the State to make personal service on the condemnees, who continued all the while to reside in the house; which was *not* taken. The "there" clearly and unequivocally refers to the house, so that the court's finding is in no way germane to the question of whether and until when the condemnees continued in possession of the appropriated strip.

Without any precedent in the cases, and without a word of invitation from the Legislature, the decision appealed has wrought a number of unique results. It is impossible to determine which of the following phenomena will appear in a given case, but each and every one of them is a factual prospect or a court-approved procedure engendered in this case for the first time. We set forth what the court below has accomplished by its holding:

1. Assumed that the claimants at bar continued in possession of the appropriated strip of land during all of the time in question, with no basis in the proof for the assumption.

2. Enacted that the State may, by withholding notice of the taking from the condemnee—*after* the taking is a fact—turn the condemnee into a paying tenant, whether he likes it or not.

3. Enacted that rent for such tenancy shall be the absolute equivalent of interest on the price of the land taken, and that the value of the enforced tenancy need not be the subject of any factual investigation looking to the determination of the land's true rental value.

4. Enacted that notice of the taking need not be personal, but that the State may stop all interest beyond six months' worth on the condemnee's claim simply by filing the map and sitting back—which means that as concerns a most substantial aspect of the situation—the interest on the claim—the notice given the condemnee need not be personal service, as set forth in the appropriating statute. There need be (a) either no notice at all, or (b) only such notice as the condemnee may have from the State's taking of possession. Which of the two the court applies to the instant case cannot be determined. Either course has been labelled satisfactory, in the alternative.

5. Created a new category of matter to be litigated in condemnation cases, in the event that (b) under paragraph 4, above, is applied. Thus, if a claimant by some obscure means can prove that he was *not* in possession of the appropriated land after the taking, so that it cannot be found that he had an enjoyment of it equivalent to interest on the claim (the alternative suggested by the court when the State has not taken possession), then the moment when the State *does* take possession becomes germane, for it apparently determines when the out-of-possession claimant

had notice of the taking, and thus when the six months begins to run (after which interest stops). And what is it that will constitute the taking of possession? That is *another* burden of evidence suddenly imposed on condemnation litigants. If all of this seems a trifle confusing, it is.

6. Removed all incentive from the State's agents to make prompt personal service on the condemnee, as contemplated by the statute of appropriation, by establishing rules which ensure that the State will never be the loser by its own delay. Its liability will forever be the value of the land taken as of the time of filing of the map, plus six months' interest thereon, until the claim is filed. And if notice be not served personally on the claimants for 22 years, instead of 22 months as at bar, and the claim is not filed until after such duration, the State's liability will still not be a penny greater. Under such rules, why should the State serve personal notice at all? What does it matter to the State that the two-year Statute of Limitations on the claim will not begin to run until after such service of notice? If the proof is difficult, it is just as difficult after such lapse of time for the condemnee to prove the value of the land as for the State to disprove it.

7. Deprived the condemnee of the use of the time between the passing of title and his learning of its passing — time which the condemnee might well use to search for premises more suited to his needs and tastes than those remaining to him after the State has taken what it wishes.

8. Opened the door to the absolutely unjustifiable expense of improving condemned land. This we deem the most outstanding deficiency in the court's holding. If a

condemnee remains in possession after title has passed—knowing nothing of its passing—he will frequently improve the land on the very reasonable assumption that he owns it. We would not include such improvements as the building of another house or anything of that nature, for we may assume that a survey would precede such building and we would even go so far as to assume that in the course of it a search of the County Clerk's records would be made, which would reveal the taking by the State. But we allude to other substantial and often expensive improvements which would not involve a search of title or records: the adding of a wing to a building, the sinking of a well, the placement of a sprinkling system, the landscaping of a garden, the installation of a pond or pool, or playground equipment for children—all of the foregoing being clearly within what the condemnee justly considers the boundaries of his property. The possibilities here are vast. Who is ultimately liable for the improvements? The condemnee or the State? Either way, the outlay is unjustified. Either the condemnee takes the loss, which is grossly unfair to him, or the people of the State sustain it, which is just as unfair to all of us. The people are entitled to expect more careful treatment of their interests, and it would certainly seem that the Legislature did not plan these unfortunate results.

We do not see in the court's holding any foundation in precedent, in statute, in rule, in practical contemplation, or in simple fairness. We may anticipate a mass of interesting (to say the least) litigation under it. Certainly the State's agent may *elect* to provide the personal notice promptly, as the statute contemplates, and that would solve everything. He did not do so here. And it would seem

that there should be something more binding upon the State's agents than their own discretion—and the statute (Highway Law, § 347), in our opinion, was intended to be so binding. Perhaps the Legislature will provide the remedy. As we see it, this case should not be disposed of as to require a remedy.

The judgment entered on the order of the Appellate Division should be reversed, and the original judgment of the Court of Claims reinstated, with costs in this court and in the Appellate Division.

Judges DESMOND, DYE and BURKE concur with Judge VAN VOORHIS; Chief Judge CONWAY dissents in an opinion in which Judges FULD and FROESSEL concur.

Judgment affirmed.

APPENDIX D

JUDGMENT

STATE OF NEW YORK—COURT OF CLAIMS

NORMAN LaPORTE and ARDIS LaPORTE,

Claimants-Appellants,

against

THE STATE OF NEW YORK,

Defendant-Respondent.

The above named claimants-appellants having appealed to the Court of Appeals from a judgment following appeal

to the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's office of the Court of Claims on May 8, 1958, which judgment reversed an order of the Court of Claims entered in the Clerk's Office thereof on February 25, 1957, on the law, and granting the State's motion to amend the decision, without costs, and modifying judgment of the Court of Claims entered on October 25, 1957, accordingly, and as so modified affirming same, without costs; and said appeal having been argued by Dante M. Scaccia, Esq., attorney for the claimants-appellants, and by Julius L. Sackman, Esq., of counsel, for Honorable Louis J. Lefkowitz, Attorney General, of counsel for the defendant-respondent, The State of New York; and after due deliberation the Court of Appeals having handed down its decision on May 14, 1959, affirming the judgment appealed from without costs, opinion by Van Voorhis, J., all concurring except Conway, Ch. J., who dissented in an opinion in which Fuld and Froessel, JJ., concurred; and an order having been entered in the Clerk's Office of the Court of Appeals on May 14, 1959, affirming the judgment so appealed from without costs and having further ordered that the record and proceedings be remitted to the Court of Claims of the State of New York, there to be proceeded upon according to law;

And the original record on appeal together with a certified copy of the order of the Court of Appeals entered in the Clerk's office thereof on May 14, 1959, having been filed in the Clerk's office of the Court of Claims on May 25, 1959, it is

ORDERED AND ADJUDGED that the judgment entered in the Clerk's office of the Court of Claims on May

8, 1958, reversing the order appealed from on the law and modifying the judgment of the Court of Claims entered on October 25, 1957 and awarding the claimant the sum of Four Thousand Four Hundred Four Dollars ($4,404.00), be and the same hereby is affirmed, without costs.

Dated: Albany, N. Y., May 25, 1959.

/s/ JOHN J. CLARK,
Clerk of the Court of Claims.